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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

NO. 332

LEON JOHNSON, alias ROBERT McMILLAN,
Respondent,
v.
CHARLES L. DYE, Warden of the Allegheny County Jail, Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States.

The Commonwealth of Pennsylvania respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above case May 17, 1949, which reversed the Judgment of the District Court of the United States for the Western District of Pennsylvania, and discharged the petition for a writ of habeas corpus.

STATEMENT OF MATTER INVOLVED.

Leon Johnson was indicted in Cobb County, Georgia, for the murder of his paramour, Sarah Frances Thompson. He was found guilty with a recommendation of mercy on January 25, 1943, which recommendation under Georgia law, fixed the penalty at life imprisonment.

Six months later, in June of 1943, Johnson escaped and eventually came to Allegheny County, Pennsylvania, where he was apprehended. The Governor of Georgia issued a request to the Governor of Pennsylvania, who issued an executive warrant under which Johnson was arrested. Johnson sued out a writ of habeas corpus in Allegheny County, by which he charged:

1. He was improperly convicted in Georgia;

2. That the witnesses for the State of Georgia testified falsely because of intimidation;

3. That while he was in prison, he received brutal treatment from the prison guards and that his life will be endangered if he were returned to Georgia.

The Common Pleas Court of Allegheny County heard all of the evidence of the petitioner and his witnesses together with the evidence of the Chief of Police of Cobb County, Georgia, who testified that prisoners were not ill-treated; that no prisoner had died of violence or neglect; and that the Georgia "chain gang" was abolished three years prior to the petitioners sentence. The Common Pleas Court of Allegheny County was not convinced of the truth of Johnson's averment and dismissed the writ.

An Appeal was taken to the Superior Court of Pennsylvania which sustained the lower court (Common-

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wealth ex rel. Johnson v. Dye—159 Pennsylvania Superior Court 542) and concluded, after an exhaustive review of the Georgia conviction, that he was convicted properly and that it was "manifest that little or no reliance could be placed on the relator's evidence in the court below and that the record affirmatively shows him to be an untrustworthy witness."

Although appeals from the Superior Court of Pennsylvania are heard in the Supreme Court of Pennsylvania, no petition for such an appeal was filed but, instead, Johnson filed a new petition for a writ of habeas corpus in the District Court of the United States for the Western District of Pennsylvania, alleging that he was improperly found guilty of murder in Cobb County, Georgia, and that following his conviction, he was committed to a chain gang and was a victim of cruel, barbaric and inhuman treatment, which jeopardized his life and that if he is returned to Georgia, he will meet his death by mob violence or tortured to death by his jailors. Testimony was taken from the relator and other witnesses confined in the Allegheny County Jail at that time, all of whom except one were escaped prisoners from Georgia, but no testimony was introduced by the Commonwealth of Pennsylvania on behalf of the State of Georgia. After hearing petitioner and his witnesses, petition for a writ of habeas corpus was discharged, following which, an appeal was taken to the United States Court of Appeals for the Third Circuit which reversed the District Court and found that Johnson suffered cruel and unusual punishment at the hands of the employees of the prison system of Georgia and that such action on the part of the employees was the action also of the State of Georgia which, in turn, was a violation of the 8th

Amendment of the United States Constitution as implemented by the 14th Amendment, and discharged the prisoner.

A petition for stay of mandate was presented by the Commonwealth of Pennsylvania, pending a petition for writ of certiorari to the United States Court of Appeals for the Third Circuit, which, on May 27, 1949, ordered the mandate stayed.

Subsequently the District Attorney of Allegheny County filed a motion for leave to file a petition for rehearing out of time. A similar motion was filed by the Attorney General of Pennsylvania. A motion for leave to intervene was filed by the State of Georgia, alleging lack of notice of the proceedings, particularly, lack of notice of an invitation by the Circuit Court to appear and argue Amicus Curiae.

All motions were denied.

JURISDICTION.

The jurisdiction of this court is invoked under Title 28, Section 1254 of the United States Code.

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QUESTIONS PRESENTED.

1. Did the Circuit Court err in refusing to adhere to doctrine of exhaustion of state remedies by permitting federal jurisdiction in a habeas corpus proceeding where escaped murderer had remedy by appeal from decision of two lower state courts to highest court of state but did not utilize such remedy.

2. Did the Circuit Court err in holding that the fourteenth amendment incorporates or implements the eighth amendment principles thereby applying eighth amendment restrictions to the states?

3. Did the circuit court err in using the standards for cruel and unusual punishment under the Eighth Amendment to mark the limitations upon the states provided by the Fourteenth Amendment?

4. Where the Circuit Court reversed the District Court on the question of inclusion of Eighth Amendment principles in the Fourteenth Amendment, did the Circuit Court err in not remanding the case to the District Court for an opportunity to introduce testimony as to treatment of prisoners in Georgia prisons, which evidence on the question of cruel and barbarous treatment became relevant for the first time?

5. Did the Circuit Court err in making a finding of cruel and unusual punishment when no conclusive statement of such a finding was made by the District Court?

6. Was there sufficient evidence in the record to permit the Circuit Court to conclude that the petitioner suffered cruel and unusual punishment particularly since evidence of this nature was not considered relevant by the District Court Judge?

7. Assuming that the Circuit Court is right in applying the eighth amendment by implementation of the fourteenth amendment, to the states, is the Circuit Court correct in extending the scope of the amendment to actions of employees of a prison which heretofore was limited to the actions of legislative bodies and judges of the court.

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REASONS FOR ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals has decided an important question of federal law in a way that is probably in conflict with the applicable decisions of this Court in reference to the scope of the eighth amendment to the constitution of the United States.

The Supreme Court has closed the issue on whether the fourteenth amendment is shorthand for the first eight amendments and thereby incorporates them (*Wolf v. Colorado,* 17 Law Week 4538; *Adamson v. California,* 322 U. S. 46) yet in the instant case the Circuit Court decides that the cruel and unusual punishment clause in the eighth amendment is implemented by the fourteenth amendment and therefore applies to the states.

The opinion is not predicated upon the fourteenth amendment which prohibits states from actions not implicit in the concept of ordered liberty. (*Palko v. Connecticut* 302 U. S. 319).

The Circuit Court cites *Weems v. United States,* 217 U. S. 349, a case involving a statute prescribing imprisonment in claims violating the Eighth Amendment of the Constitution as a measure of what constitutes cruel and unusual punishment in the instant case.

2. The Circuit Court has decided that another federal question in conflict with applicable decisions in this court by holding that the Eighth Amendment of the Constitution goes further than limiting the legislative bodies and Judges of the courts, *Weems v. U. S., supra,* although holding that a statute prescribing punishment in chains violated the Eighth Amendment made clear

that the Amendment applies only to lawmaking bodies and to judges of the courts (*Weems v. U. S.* 217 at 409). It has also been decided in *Francis v. Reswebber,* 329 U. S. 459, that the penological policy of a state court is not to be tested by the scope of the Eighth Amendment.

3. The majority of the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision in that it invaded the promise of the lower court, who made no finding of cruel and unusual punishment and the Circuit Court of its own accord with no further evidence introduced or no opportunity to see the witnesses made a new finding of fact unsupported by evidence and contrary to the conclusion reached by the Common Pleas Court of Allegheny, the Superior Court of Pennsylvania and the District Court of the United States for the Western District of Pennsylvania.

4. The Circuit Court of Appeals has rendered a decision in an important federal question of law probably in conflict with applicable decisions of this Court and the statute in determining that habeas corpus cases involving questions of constitutional guarantees, need not comply with the doctrine of exhaustion of states remedies which is not in accord with, or distinguished from this Honorable Court's opinion in *Jack O'Lee Young v. Joseph E. Ragen,* #50 October Term, 1948, decided June 6, 1949, (17 United States Law Week 4476), following the instant decision, which requires scrupulous adherence by all Federal courts to the doctrine of exhaustion of state remedies in habeas corpus cases.

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5. The Circuit Court has rendered a decision deciding an important question of local law in a way probably in conflict with applicable local decisions and practices.

It has always been the sovereign right of the Commonwealth of Pennsylvania to administer the operation of its prisons, jails, mental asylumns, training schools for juveniles and similar institutions without supervision from Federal Courts or other agencies of the Federal government.

When conditions are discovered, as they have been, which indicate that an inmate of any institution within the Commonwealth has been improperly or harshly treated by any executive or employee of any institution, the Commonwealth of Pennsylvania through its established laws, investigates and can and has discharged from employment the guilty parties and in many cases have caused indictments to be found.

6. The Circuit Court has rendered a decision in conflict with decisions of other Circuit Courts of Appeal on the same matter by holding that the doctrine of exhaustion of state remedies does not apply to extradition proceedings; as was held to apply in the first circuit case of *Lyon v. Harkness* 151 F 2d 731, certiorari denied, 321 U. S. 182.

PRAYER.

WHEREFORE, your petitioner prays that a Writ of Certiorari be issued under the seal of this court directed to the United States Court of Appeals for the Third Circuit, commanding said Court to certify and send to this court the transcript of the record, in the above entitled cause, being No. 9471 October Term, 1947 in that Court, and that the record and judgment of said Court be considered to the end that said cause may be reviewed and determined and that the judgment of the United States Court of Appeals for the Third Circuit, be reversed and the cause remanded for further proceedings according to law.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Opinions Below.

The opinion of the Court of Appeals for the Third Circuit (R. ....) was filed May 17, 1949. The opinion is reported in the advance sheets at 175 F2 250. The opinion of the District Court (R. ....) is reported at 71 Federal Supplement 262. The opinion of the Superior Court of Pennsylvania is reported 49 Atlantic 2nd page 197.

Jurisdiction.

The jurisdiction of this Court is invoked under Title 28, Section 1254, of the United States Code.

Specification of Error.

The lower court erred in reversing the judgment of the Court below, as follows (R. ....).

Accordingly the judgment of the Court below will be reversed and the cause will be remanded with the direction to issue the writ and discharge the prisoner.

Argument.

The United States Court of Appeals for the Third Circuit has arrived at a conclusion of law not heretofore decided by the Supreme Court, by accepting as a finding of fact, matter insufficiently proved and not part of critical finding of the court below, and incorrectly appraising the law concerning the assumed fact.

CIRCUIT COURT SUBSTITUTES OWN FINDINGS OF FACT.

The Circuit Court denounces torture and brutality to prisoners; claims such treatment in a state prison violates the Eighth Amendment to the Constitution as implemented by the Fourteenth.

But, as the minority opinion points out (R. ....), the "majority . . . not only substitutes its own findings of fact for an inconclusive statement of the Court below, but also deems no conclusion possible other than Johnson suffered cruel and unusual punishment prior to his flight from Georgia."

Before the Court, in this case, decided so emphatically that the Fourteenth Amendment to the Constitution incorporated the "cruel and unusual punishment" clause of the Eighth Amendment against the States, it should have first before it sufficient evidence to support a finding that Johnson suffered brutal treatment and that such particular treatment was contemplated in the Eighth Amendment as a violation thereof.

The Circuit Court grasps at certain words of the District Judge which he wrote in dismissing consideration of certain evidence he did not deem relevant to the case.

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The District Judge said (R. ....):

"There is evidence that Johnson received cruel treatment * * * However, such treatment would not entitle him to his liberty as it does not constitute a custody of relator in violation the Constitution or laws of the United States 28 U.S.C. 453. The Eighth Amendment is not a limitation upon the States. *Collins v. Johnson,* 237 U. S. 502, 510-511."

Clearly the District Court made no finding of cruel treatment; only that such testimony was offered but not necessary to consider since it wasn't relevant.

But the majority opinion of the Circuit Court quotes the above from the trial and continues (R. ....)

"We deem the first sentence quoted in this paragraph constitutes a finding by the court below that Johnson had been subjected to cruel treatment following his conviction. It is obvious also that in using the phrase "cruel treatment" the court below was referring to the cruel and unusual punishment provision of the Eighth Amendment."

"Without regard for minutiae of conclusion in the trial court's opinion we think it misinterpreted the ruling of the Supreme Court in Collins v. Johnson, Supra."

If the lower court erred in its conclusion concerning the limits of the application of the Eighth Amendment as the Circuit Court suggests, then the Circuit Court should have remanded the case, for testimony of 'cruel' treatment with instructions to make a finding thereon. This was the conclusion (R. ....) of the minority.

Such an order of remand would enable the Commonwealth of Pennsylvania to introduce evidence from prison and police authorities of the State of Georgia (there was no such evidence in this case at any state of the Federal Court proceedings) as was done in the recent N. Y. Supreme Court case of *Jackson v. Ruthazer* (reported N. Y. Law Journal, June 21, 1949, page 2204). The relator in the Jackson case, relying on the Circuit Court opinion of *Johnson v. Dye,* testified to outrageous brutalities and submitted magazine articles (such as were introduced in the District Court proceedings of the instant case) describing one time conditions in Georgia prisons. Following the testimony of Georgia officials and introduction of prison records, the New York Court stated:

> "The conclusion is that relator has failed to prove the acts of brutality or of the cruel or inhuman punishment claimed and that if returned, he will be subjected to cruel and inhuman treatment, or be placed in grave danger of bodily injury or death. On the contrary, the evidence on behalf of the State of Georgia shows that the relator has been accorded due process of law and if returned, will not be subjected to cruel and inhuman treatment or brutal and unusual punishment."

To remand the instant case for a critical finding of fact based upon evidence would have relieved the Circuit Court of invading the province of the court below as was stated in the minority opinion (pp. 14-15):

> "True, several witnesses testified to 'the known facts concerning the working of the Georgia penal system at the time of the petitioner's sentence'; but, in the court below, only one witness professed

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to actual knowledge of how Johnson, and not chain-gang prisoners in general, was treated: Johnson himself. I think that Johnson may well have told substantial truth when he described his chain-gang ordeals; and I think the district court had ample basis for making such a critical finding of fact; but I see no reason why this court should invade the province of the court below and insist that credibility be attached to Johnson's testimony. It must be recalled that the burden of proof of his allegations lay with Johnson, whose testimony is to be viewed in the light that he has a vital interest in the outcome, and who has been disbelieved by other courts.[2] The case at bar seems to me one particularly appropriate for adherence to the usual procedure of leaving the finding of facts to the court of first instance."

FOURTEENTH AMENDMENT NOT SHORTHAND FOR FIRST EIGHT.

Notwithstanding the celebrated decisions in *Twining v. New Jersey*, 211 U. S. 78; *Palko v. Connecticut*, 302 U. S. 319; *Adamson v. California*, 332 U. S. 46, and *Hurtado v. California*, 110 U. S. 516—all clearly separating the rights guaranteed under the Fourteenth Amendment against the States from those rights guaranteed

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2. At his murder trial in Georgia, Johson limited his defense to his written statement alleging that the homicide was accidental; but the jury found him guilty of murder. As to Johnson's testimony in his habeas corpus hearing in the Court of Common Pleas of Allegheny County, the Superior Court of Pennsylvania stated that the record "affirmatively shows him to be an untrustworthy witness." 49 A. 2d at page 197."

against the Federal Government in the first Eight Amendments to the Constitution, the Circuit Court ignores the well settled distinctions and decides that certain restrictions in the first Eight Amendments are "implemented by reason of operation of the Fourteenth Amendment."

The Circuit Court says (R. . . . .) under the following heading:

> "As to the Application of the Eighth Amendment of the Constitution of the United States by Implementation Under the Fourteenth Amendment."
>
> "We are not called upon to decide, nor do we decide, whether *the clauses of the Eighth Amendment* relating to *imposition* of excessive bail, or excessive fines, fall *within* the ambit *of the Fourteenth Amendment.* But we entertain no doubt that the Fourteenth Amendment prohibits the *infliction of cruel and unusual punishment by a state."* (Emphasis ours)

The Twining case cautions about new limitations on the states, and says that such limitations are a matter of grave import—yet are enforced by the Supreme Court. However, the opinion states at page 93:

> "it is recognized by counsel, that by a long line of decisions, the first ten amendments are not operative on the states. Barrow v. Baltimore, 7 Pet. 243; Spies v. Illinois, 123 U. S. 131; Brown v. N. J., 175 U. S. 172; Barrington v. Missouri, 205 U. S. 483."

In *Collins v. Johnston,* 237 U. S. 502, 510, Mr. Justice Pitney speaks:

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"The Eighth Amendment is also invoked, with its prohibition of cruel and unusual punishments; but, as has been pointed out, this is a limitation upon the Federal Government, not upon the States."

Adamson v. California, 332 U. S. 46, though Mr. Justice Reed—follows Twining case and strengthens it —at P. 53 states:

"The due process clause of the Fourteenth Amendment, however, does not draw all the rights of the Federal Bill of Rights under its protection."

Mr. Justice Frankfurter in the concurring opinion in the Adamson case says the Twining case is an outstanding opinion of this Court and "should not now be diluted, either in its judicial philosophy or in its particulars."

At page 67 Mr. Justice Frankfurter says:

"Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English speaking peoples even toward those charged with the most heinous offenses. * * * *The judicial judgment* in applying the Due Process Clause *must move within the limits of accepted notions of justice and is not to be based upon the idosyncrasies of a merely personal judgment.* * * * An important safeguard against such merely individual judgments is an *alert deference to the judgment of the State Court under review.* (Emphasis ours)

In *Wolf v. Colorado* — decided June 27, 1949 — 17 U. S. Law Week 4638—Mr. Justice Frankfurter stated:

> "The notion that the 'due process of law' guaranteed by the Fourteenth Amendment is short-hand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by this court again and again, after impressive consideration. See e.g. Hurtado v. California, 110 U. S. 516; Twining v. New Jersey, 211 U. S. 78; Brown v. Mississippi, 297 U. S. 278; Palko v. Connecticut, 302 U. S. 319. * * * The issue is closed."

EIGHTH AMENDMENT NOT VIOLATED.

Even if the Court were right in implementing a clause in the Eighth Amendment by operation of the fourteenth, it would not warrant the decision arrived at in this case because yet to be determined is: (A) what is cruel and unusual punishment, as meant in the Eighth Amendment, and (B) who is prohibited from offering such treatment by the Eighth Amendment?

The State of Georgia in imposing a life sentence for murder is not guilty of offering cruel punishment.

It is clear from the dissenting opinion of Justices White and Holmes in *Weems v. U. S.*, 217 U. S. 349 at 409, that the amendment refers only to judges and legislatures, not to be invoked to permit persons convicted of crime to escape penalty because of an alleged wrongdoing of a prison employee. Even the Circuit Court finds no fault with the penalty prescribed by the Georgia law and imposed by the Court.

The dissent in the *Weems* case, particularly referred to by Mr. Justice Frankfurter in his opinion in Francis

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v. Reswebber (329 U. S. 459), did not find that use of chains on prisoners violated the Eighth Amendment (where it applied). Justice White, and he was concurred in by Justice Holmes, stated (at p. 412):

> "I do not assume that the mere fact that a chain is to be carried by the prisoner causes the punishment to be repugnant to the bill of rights * * *. Such a provision may well be part of the ordinary prison discipline, particularly in communities where jails are insecure * * *."

And further at p. 409:

> "* * * Cruel, as used in the Amendment, forbids only the law-making power, in prescribing punishment for crime, and the courts in imposing punishment, from inflicting unnecessary bodily suffering through a resort to inhuman methods for causing bodily torture, like or which are of the nature of the cruel methods of bodily torture which had been made use of prior to the Bill of Rights of 1689, * * * The word 'unusual' accomplished only three results: First, it primarily restrains the courts when acting under the authority of a general discretionary power to impose punishment, such as was possessed at common law, from inflicting lawful modes of punishment to so unusual a degree as to cause the punishment to be illegal, because to that degree it cannot be inflicted without express statutory authority; second, it restrains the courts in the exercise of the same discretion from inflicting a mode of punishment so unusual as to be impliedly not within its discretion, and to be consequently illegal in the absence of express statutory authority; and, third, as to both the foregoing, it operated

> to restrain the lawmaking power from endowing the judiciary with the right to exert an illegal discretion as to the kind and extent of punishment to be inflicted."

It was the majority opinion in this case (the Weems case) on which the Circuit Court depended for a definition of cruelty under the Eighth Amendment.

The Circuit Court did not take into account that the decision of the *Weems* case construed a statute providing such punishment under a Constitution which prohibited cruel and unusual punishment.

The United States Supreme Court in *Frances v. Reswebber,* 329 U.S. 459, makes a clarifying statement by Mr. Justice Frankfurter who stated p. 470):

> "But the penological policy of a state is not to be tested by the scope of the Eighth Amendment and is not involved in the controversy which is necessarily evoked by that Amendment as to the historic meaning of 'cruel and unusual punishment.' See Weems v. United States 217 U. S. 349, and particularly the dissenting opinions of White and Holmes."

Any other conclusion would automatically charge the United States Supreme Court with the supervision of all state prisons and would permit those who have been convicted of crime to gain release if illegally abused by prison attendants. The present practice of local and state authorities is to investigate such abuses, discharge or indict the parties responsible for the bad treatment of inmates, not only of jails and penitentiaries but reformatories, mental asylums, juvenile training schools and the like.

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As was said by Mr. Justice Moody in *Twining v. N. J.* 211 U. S. at 91:

> "In order to bring themselves within the protection of the Constitution it is incumbent on the defendants to prove two propositions: first, that the exemption from compulsory self-incrimination is guaranteed by the Federal Constitution against impairment by the states; and, second, if it be so guaranteed, *that the exemption was in fact impaired in the case at bar.*" (Emphasis ours)

STATE REMEDIES FOR HABEAS CORPUS NOT EXHAUSTED.

There was no jurisdiction in the Federal Court since the state remedies were not exhausted. The petitioner for the writ of habeas corpus first applied in the Common Pleas Court of Pennsylvania and was denied his release and remanded for return to Georgia. His appeal to the Superior Court affirmed the lower court. No petition for a reargument in the Superior Court was asked. No appeal or petition to the Supreme Court for allocatur followed.

Pennsylvania laws provide for an appeal in habeas corpus by petition for allocatur. (*Commonwealth ex rel, Oveido v. Buldi,* 347 Pa. 601)

Furthermore the Supreme Court has original jurisdiction in habeas corpus. (*Commonwealth ex rel Townsend v. Burke,* 361 Pa. 35)

The Act of 1836 June 16, P. L. 784 S. 7; 17 Purdon Statutes 48 provides:

> "The judges of the Supreme Court shall have full power and authority, when, and as often as there may be occasion, to issue writs of habeas corpus, writs of certiorari and all remedial and other writs and process, returnable to the said Court."

The Act of 1836 June 16, P. L. 784 S. 1, 17 Purdon Statutes 41 provides:

"The Supreme court of this commonwealth shall have power to hear and determine all, and all manners of pleas, plaints and causes which shall be brought, or removed there from any other court of this commonwealth, by virtue of any writ or process issued by the said court, or any judge thereof, for that purpose, in the manner now practised and allowed, to examine and correct all and all manner of errors of the justices, magistrates, and courts of this commonwealth in the process, proceedings, judgments and decrees, as well in criminal as in civil pleas or proceedings, and thereupon, to reverse, modify, or affirm such judgments and decrees, or proceedings, as the law doth or shall direct; and generally, to minister justice to all persons, in all matters whatsoever, as fully and amply, to all intents and purposes, as the said court has heretofore had power to do, under the Constitution and laws of this commonwealth; and shall have power, and is required to issue execution, or other process, for the recovery of costs which have accrued, or may accrue in said supreme court, as well as in all cases which have been heretofore decided."

To avoid applying the clear and settled statements of law by this Honorable Court and the statutes enacted by Congress[1] that state remedies must be exhaused be-

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[1] Existing laws as declared by Ex Parte Hawk was made part of the statute by the New Judicial Code, 28 U. S. C. S. 2254, which provides:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears

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fore federal jurisdiction applies, the circuit court attempts to distinguish the instant case from *Ex Parte Hawk,* 321 U. S. 114 and from the subsequent (to the Circuit Court's decision in the Johnson case) decision of *Jack O'Lee Young, petitioner v. Ragen, Warden,* at No. 50 October Term, 1948, June 6, 1949. The Circuit Court calls the instant case an extradition case and says the rule therefore does not apply.

In support of this position, the circuit court cites a line of habeas corpus cases arising out of extraditions under old Title 18 section 662, of the U. S. C. A. (now section 3182 of Title 18 U. S. C. A.) under which a federal habeas corpus is allowed when governors of one state or territory are demanding a fugitive's return for trial. Such a habeas corpus tests the regularity of the procedure, the identity of the prisoner, and whether a crime had been committed in the demanding state. The cases cited follow.

In *Roberts v. Reilly,* 116 U. S. 80, the relator complained of the sufficiency of the indictment and averred he was not present in the demanding state at the time alleged;

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that the applicant has exhausted the remedies available in the courts of the state, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the Courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

In *Biddinger v. Commissioner*, 245 U. S. 128, relator claimed he was not a fugitive since he was not in the demanding state at the time alleged;

In *Hogan v. O'Neill*, 255 U. S. 52, relator alleged that indictment did not sufficiently charge him with a crime;

In *Drew v. Thaw*, 235 U. S. 42, the question was whether a crime was charged in the indictment;

In *U. S. v. Meyering*, 75 F. 2d 716, there was no copy of the indictment with the extradition papers;

In *United States v. Sup't of County Prisons*, 111 F. 2d 409, the relator alleged no crime was charged in the indictment.

The regularity of the procedure by which the state or territory can demand fugitives from an asylum state or territory for trial in the demanding state is all that is contemplated by habeas corpus under that provision.

Not so in the instant case.

The instant case concerns itself primarily with rights guaranteed by amendments to the United States. The Federal extradition law is not in issue—nor is there any attack on the regularity of the extradition proceedings.

The instant case involves the identical question raised in *Ex Parte Hawk*, 321 U. S. 114 where the petitioner claimed that he was not adequately represented by counsel when forced to trial.

In a per curiam opinion the Court said:

"We cannot say that he is not entitled to a hearing on these contentions. But as was pointed out, peti-

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tioner has not yet shown that he has exhausted the remedies available to him in the state courts, and he is therefore not at this time entitled to relief in a federal court or by a federal judge."

Hawk had been denied a writ of Habeas Corpus by the Illinois Supreme Court but still could apply to the lower court and still had available a common law writ of Coram Nobis. The Supreme Court said:

"Until that remedy has been sought without avail we cannot say that petitioners' state remedies have been exhausted."

And the United States Supreme Court denied his petition for a writ of habeas corpus without prejudice.

The Hawk case was followed and approved by *Young v. Ragen, Warden,* No. 50 October Term, 1948, decided June 6, 1949, 17 U.S. Law Week 4476, where the Chief Justice said:

"Unless habeas corpus is available, therefore, we are led to believe that Illinois offers no post-trial remedy in cases of this kind. The doctrine of exhaustion of state remedies, to which this court has required the scrupulous adherence of all Federal Courts, see ex parte Hawk, 321 U. S. 114; and all cases cited, presupposes that some adequate state remedy exists."

Chief reliance was placed by the Circuit Court on the case of *U. S. v. Meyering,* 75 F. 2d 716, to remove the instant case from the doctrine of exhaustion of state remedies.

In the Circuit Court opinion the majority says:

"It was held by the Court of Appeals for the Seventh Circuit in United States v. Meyering, 75 F. 2 716, 718, that if a petitioner had begun a proceeding in a state Court for habeas corpus he could nevertheless discontinue that proceeding and file his petition for relief in a federal district court."

The opinion does NOT say this.

In the Meyering case the petitioner DID EXHAUST HIS STATE REMEDIES. The Supreme Court of Illinois had turned him down. The Circuit Court there said, obiter dicta, that (under the extradition statute) the petitioner might have petitioned the United States Supreme Court for certiorari to the Supreme Court of Illinois instead of filing a petition for habeas corpus in the District Court, or he could abandon his proceedings begun in the State Court by not petitioning the United States Supreme Court for a certiorari to the Illinois Supreme Court at any stage after applying for certiorari and by commencing a habeas corpus in the District Court.

It did not say that petitioner could abandon his state remedies at any stage in the State Courts and receive relief from Federal courts.

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CONFLICT OF CIRCUITS.

In the case of *Lyman v. Harkness,* 151 F. 2d 731, in a per curiam opinion the Court of Appeals of the 1st Circuit affirmed the lower courts refusal to grant a writ of habeas corpus on grounds of violation of U. S. Constitution because the prisoner failed to apply in the State Court for such a writ to avoid extradition from New Hampshire. The court said that *Ex Parte Hawk, supra,* applies.

In *Kaufmann v. Mount, Sheriff,* 131 F. 2d 112, the Court of Appeals for the 5th Circuit refused a writ of habeas corpus arising out of interstate extradition.

Respectfully submitted,

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In the

Supreme Court of the United States

OCTOBER TERM, 1949

NO. 332

LEON JOHNSON, alias ROBERT McMILLAN,
Respondent,

v.

CHARLES L. DYE, Warden of the Allegheny
County Jail, Petitioner

AMICUS CURIAE BRIEF

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The State of Georgia, a sovereign State of the United States of America, files this brief in support of the petition for the writ of certiorari to the United States Court of Appeals for the Third Circuit, filed in this court by Charles L. Dye, Warden of the Allegheny County, Pennsylvania, jail.

REFERENCE TO REPORTS OF OPINIONS IN COURTS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is printed as Leon Johnson, alias Robert McMillan, Appellant, v. Charles L. Dye, Warden of the Allegheny County Jail, in 175 Fed. (2d), 250. The opinion of the District Court of the United States for the Western Dis-

trict of Pennsylvania is printed as Johnson v. Dye, in 71 Fed. Supp., 262.

STATEMENT OF JURISDICTION

The State of Georgia adopts the statement of jurisdiction as made in the brief for petitioner.

INTEREST OF THE AMICUS CURIAE

1. The respondent was convicted of murder and escaped from a Georgia prison, and his return was and is sought by the State of Georgia.

2. The legal position of the State of Georgia differs from that of the petitioner upon the question of the application of the doctrine of exhaustion of state remedies in habeas corpus cases arising from extradition proceedings.

3. The legal position of the State of Georgia differs from that of the petitioner upon the question of the application of the 8th and 14th Amendments to the United States Constitution to the facts of this case.

4. The State of Georgia, though not a party to this action, has been subjected to unseemly comment of a derogatory nature not in keeping with the respect due a sovereign state under the federal system. It files this brief to support such action as will provide it opportunity to negative charges made by the escapee and sanctioned by the Court of Appeals.

STATEMENT OF THE CASE

The petitioner has stated the matter involved as follows:

Leon Johnson was indicted in Cobb County, Georgia, for the murder of his paramour, Sarah Frances Thompson. He was found guilty with a recommendation of mercy on January 25, 1943, which recommendation under Georgia law, fixed the penalty at life imprisonment.

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Six months later, in June of 1943, Johnson escaped and eventually came to Allegheny County, Pennsylvania, where he was apprehended. The Governor of Georgia issued a request to the Governor of Pennsylvania, who issued an executive warrant under which Johnson was arrested. Johnson sued out a writ of habeas corpus in Allegheny County, by which he charged:

1. He was improperly convicted in Georgia;

2. That the witnesses for the State of Georgia testified falsely because of intimidation;

3. That while he was in prison, he received brutal treatment from the prison guards and that his life will be endangered if he were returned to Georgia.

The Common Pleas Court of Allegheny County heard all of the evidence of the petitioner and his witnesses together with the evidence of the Chief of Police of Cobb County, Georgia, who testified that prisoners were not ill-treated; that no prisoner had died of violence or neglect; and that the Georgia "chain gang" was abolished three years prior to the petitioner's sentence. The Common Pleas Court of Allegheny County was not convinced of the truth of Johnson's averment and dismissed the writ.

An Appeal was taken to the Superior Court of Pennsylvania which sustained the lower court (Commonwealth ex rel. Johnson v. Dye—159 Pennsylvania Superior Court 542) and concluded, after an exhaustive review of the Georgia conviction, that he was convicted properly and that it was "manifest that little or no reliance could be placed on the relator's evidence in the court below and that the record affirmatively shows him to be an untrustworthy witness."

Although appeals from the Superior Court of Pennsylvania are heard in the Supreme Court of Pennsylvania, no petition for such an appeal was filed but, instead, Johnson filed a new petition for a writ of habeas corpus in the District Court of the United States for the Western District of Pennsylvania,

alleging that he was improperly found guilty of murder in Cobb County, Georgia, and that following his conviction, he was committed to a chain gang and was a victim of cruel, barbaric and inhuman treatment, which jeopardized his life and that if he is returned to Georgia, he will meet his death by mob violence or tortured to death by his jailors. Testimony was taken from the relator and other witnesses confined in the Allegheny County Jail at that time, all of whom except one were escaped prisoners from Georgia, but no testimony was introduced by the Commonwealth of Pennsylvania on behalf of the State of Georgia. After hearing petitioner and his witnesses, petition for a writ of habeas corpus was discharged, following which, an appeal was taken to the United States Court of Appeals for the Third Circuit which reversed the District Court and found that Johnson suffered cruel and unusual punishment at the hands of the employees of the prison system of Georgia and that such action on the part of the employees was the action also of the State of Georgia which, in turn, was a violation of the 8th Amendment of the United States Constitution as implemented by the 14th Amendment, and discharged the prisoner.

A petition for stay of mandate was presented by the Commonwealth of Pennsylvania, pending a petition for writ of certiorari to the United States Court of Appeals for the Third Circuit, which, on May 27, 1949, ordered the mandate stayed.

Subsequently the District Attorney of Allegheny County filed a motion for leave to file a petition for rehearing out of time. A similar motion was filed by the Attorney General of Pennsylvania. A motion for leave to intervene was filed by the State of Georgia, alleging lack of notice of the proceedings, particularly, lack of notice of an invitation by the Circuit Court to appear and argue Amicus Curiae.

All motions were denied.

ISSUES INVOLVED

The questions presented by the petition, together with pe-

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titioner's reasons for the granting of the writ of certiorari, may be summarized as follows:

1. Does the doctrine which requires exhaustion of state remedies as a prerequisite to the entertainment of application for habeas corpus by federal courts apply to such applications arising from extradition proceedings?

2. Is the 8th Amendment of the United States Constitution so implemented by the 14th Amendment as to become a limitation upon state action?

3. Are the findings of fact made by the Court of Appeals properly made, and are they supported by the evidence in the record?

4. Are the criminal acts of the employees of a state prison properly attributable to the state as its official acts?

ARGUMENT AND CITATION OF AUTHORITY

The Federal Courts should not have entertained the petition for the writ of habeas corpus because the prisoner has not exhausted the State remedies.

The decision of this Court in the case of

Ex Parte Hawk, 321 U. S. 114,

and the subsequent codification of the rule therein (Title 28, U. S. C. A., Sec. 2254), flatly state that an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state.

The Court of Appeals has attempted to engraft upon this rule an exception in the case of habeas corpus proceedings brought to prevent extradition. No such exception is indicated in the decisions of this court nor in their codification; instead, both are strongly to the contrary.

Further, the United States Court of Appeals for the First Circuit has decided a similar case with an opinion in direct conflict with the opinion of the Circuit Court for the Third Circuit in this case.

Lyon v. Harkness, 151 F. (2d) 731.

To permit such an exception would violate the very purpose and basis of the decision in *Ex Parte Hawk* and its codification in Section 2254. It would once again permit prisoners detained by virtue of the judgments of state courts to flood the federal judicial system with applications for habeas corpus, as was formerly done. See,

Parker, "Limiting the Abuse of Habeas Corpus,"
8 Fed. Rules Decisions, 171.

The only additional requirement being the extremely illogical one that the remedy would be available only to *escaped* prisoners; those properly confined being still required to exhaust state remedies as a prerequisite to obtaining a hearing in the federal courts.

It should be noted that the opinion of the Court of Appeals does not predicate the entertainment of the writ upon the absence of available state corrective processes or the existence of circumstances rendering such processes ineffective to protect the rights of the prisoner; instead, the Court simply extends the rule without explanation and without the citation of any authority.

Petitioner, in its brief supporting its petition for the writ of certiorari, maintains that the federal courts should not have entertained the application for the writ of habeas corpus because the prisoner has not exhausted the remedies provided him by the judicial system of the State of Pennsylvania.

The State of Georgia agrees that the federal court should not have entertained the application for the writ, but for a different reason, viz: the scope of inquiry in an application for habeas corpus arising out of extradition proceedings is stringently limited to the following questions:

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1. Whether the person demanded has been substantially charged with a crime, and
2. Whether he is a fugitive from justice of the demanding state.

Roberts v. Reilly, 116 U. S. 80
Whitten v. Tomlinson, 160 U. S. 231
Munsey v. Clough, 196 U. S. 364
Illinois ex rel McNichols v. Pease, 207 U. S. 100
Drew v. Thaw, 235 U. S. 432
Biddinger v. Commissioner of Police, 245 U. S. 128
In re Strauss, 126 F. 327,

and does not include the right to test the legality of the original state court judgment or the methods of its execution. The State of Georgia maintains that the prisoner should have been extradited to Georgia and that there he must exhaust the corrective processes provided by the State of Georgia before the federal courts may properly entertain the application for writ of habeas corpus.

Admittedly, the federal courts may properly entertain an application for habeas corpus where there is an absence of available state corrective processes. But nowhere has it been contended that the State of Georgia does not provide adequate corrective processes for the redress of such wrongs as the prisoner here claimed.

The Constitution of the State of Georgia of 1877, and the Constitution of the State of Georgia of 1945, prohibit cruel and unusual punishments, and provide that the writ of habeas corpus shall not be suspended.

Constitution of the State of Georgia,
Art. 1, Sec. 1, Pars. 9 and 11.

The Constitutional provision providing for habeas corpus has been implemented by statute.

Georgia Code Anno., Title 50, Section 101.

The federal courts also may entertain such writs when

there exist circumstances rendering state processes ineffective to protect the rights of the prisoner. The opinion of the Court of Appeals was not predicated upon any such circumstance.

It may safely be predicted that other escapees will attempt to gain release by making similar charges without having exhausted the remedies provided by either the demanding or the asylum state as a result of the rule laid down in the instant case. This circumstance, following so closely upon the decision in *Ex Parte Hawk* and its codification, would seem to present a question demanding clarification.

Application of the 8th and 14th Amendments.

Petitioner in his brief relies on the proposition that the 8th Amendment to the United States Constitution is not a limitation upon state action, and that its provisions and prohibitions are not implemented by the 14th Amendment.

The State of Georgia does not rely upon this proposition. The right of a prisoner to be secure from invasion of his personal liberty and safety is surely such a basic and fundamental right as to be protected under any concept of ordered liberty. Georgia has provided such protection.

The Evidence does not support the Findings of Fact.

Petitioner in his brief has questioned the findings of fact made by the Court of Appeals. These findings are founded upon the following bases:

1. The testimony of the prisoner, Johnson, and that of other prisoners.

2. The following statement made by the District Court Judge:

   "There is evidence that Johnson received cruel treatment after he had been convicted of murder and after he was serving his sentence therefor."

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3. The Court's statement as follows:

"Indeed no other conclusion would be possible in view of the known facts concerning the working of the Georgia penal system at the time of the petitioner's sentence . . ." (R. 37)

4. ". . . the circumstance that the State of Georgia offered no testimony whatsoever in contradiction to that given by Johnson and his witnesses." (R. 37)

5. The contents of articles published in various magazines. These bases are worthy of separate consideration.

1. The testimony of the prisoner, Johnson, and that of other prisoners.

It should be noted that Johnson had appeared and testified in the Common Pleas Court of Allegheny County, Pennsylvania, and was apparently disbelieved.

On appeal to the Circuit Court of Pennsylvania (Commonwealth Ex Rel Johnson v. Dye, 159 Pa. Superior Court, 542), the Superior Court was upheld and the Supreme Court stated that it was "manifest that little or no reliance could be placed on the relator's evidence in the court below and that the record affirmatively shows him to be an untrustworthy witness."

The fact that Johnson was tried and convicted of murder and sentenced to life imprisonment by the courts of Georgia cannot be overlooked in evaluating his credibility.

It cannot be fairly said that the District Court found Johnson's testimony either credible or incredible because the District Court held that the subject of his testimony, his treatment, was not a proper subject for inquiry.

All the other witnesses who testified, except one, were escaped convicts from Georgia who happened to be lodged in the Allegheny County jail. The remaining witness, also a prisoner in the Allegheny County jail, had previously es-

caped from detention in Pittsburgh following his arrest for an alleged felonious assault. Certainly, the circumstances in which these witnesses were found raises a substantial question as to their credibility.

2. The following statement made by the District Court Judge:

> "There is evidence that Johnson received cruel treatment after he had been convicted of murder and after he was serving his sentence therefor." (R. 34)

The above statement of the District Court was treated as follows by the Circuit Court:

> "We deem . . . (the statement) . . . to constitute a finding by the court below that Johnson had been subjected to cruel treatment following his conviction." (R. 34)

When the statement of the District Court and the Circuit Court are juxtaposed, the extreme tenuousness of the Circuit Court's finding is clearly revealed. Such a finding is completely unsupported by the opinion of the District Court. The mere introduction of evidence of a fact in a trial court, and a statement by the trial court acknowledging the introduction of such evidence, cannot be considered a finding that such evidence was credible, accurate or conclusive.

3. The Court's statement as follows:

> "Indeed no other conclusion would be possible in view of the known facts concerning the working of the Georgia penal system at the time of the petitioner's sentence . . ." (R. 37)

It is respectfully submitted that this statement indicates that the Circuit Court based its opinion on matters outside the record.

4. ". . . the circumstance that the State of Georgia offered no testimony whatsoever in contradiction to that given by Johnson and his witnesses." (R. 37)

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The State of Georgia was not a party to the proceeding, nominally or actually. Although it is stated in the opinion of the Circuit Court that the State of Georgia had been invited to appear, the State of Georgia denied receipt of such invitation (R. 67). It is not stated by the Circuit Court that the notice given the State of Georgia was, or was intended to be, in compliance with Title 28, U.S.C.A., Sec. 2252.

It is manifestly unfair to base a finding of fact upon the circumstance that a party, not a party to the suit, nominally or actually, failed to appear and introduce testimony to contradict testimony of a convicted murderer who has several times been judicially declared to be "an untrustworthy witness."

This inequity is compounded when the absent party is a sovereign state and, as such, due to be considered by every court worthy of the highest respect. Regardless of the opinion held by the Circuit Court of the judicial and penal processes of the State of Georgia, the Circuit Court's finding is not supportable by the *absence* of the State of Georgia or by the fact that Georgia introduced no evidence.

The use of this circumstance as a basis for the opinion, and indeed the opinion itself, has the effect of placing a legal obligation upon every state to make an appearance in every proceeding where the state's attempt to extradite escaped prisoners is challenged by the prisoner. The expense, the administrative difficulty, and the indignity incident to such a requirement would be reason enough for rejecting a rule having such an effect were the question a novel one, but it is not. The limitations upon the scope of the inquiry in habeas corpus applications resisting extradition were established to prevent just such difficulties, as well as to prevent the unseemly spectacle of the lower federal courts reversing the findings of state judicial systems. To require that a state try out such cases wherever an escaped prisoner may flee is to place an unreasonable burden on the states.

5. The contents of articles published in various magazines.

The Circuit Court did not rule upon the admissibility of such periodicals, but stated that, since some of the witnesses employed the periodicals as bases of comparison, the Circuit Court considered the contents of the articles. (R. 33)

If the articles referred to were used merely as a basis for comparison, they do not, of course, have of themselves any evidentiary value beyond that of the witness making the comparison. See sub-paragraph 1 above.

The Criminal Acts of State Prison Employees are not the Acts of a State.

The Court of Appeals found that the employees of the State of Georgia had been guilty of inflicting cruel and unusual punishment upon the prisoner. The Court stated:

> ". . . and it should be pointed out that actions of the employees of the prison system of Georgia must be deemed to be those of the State of Georgia. The fact that a state officer acts illegally cannot relieve a state of responsibility for his acts. Screws v. U. S., 325 U. S. 91." (R. 36)

Admittedly, the *Screws* case held that a state agent could not avoid prosecution based upon acts criminal only if committed in an official capacity, by maintaining that such acts were committed in an individual rather than official capacity. It is quite another matter to hold that the criminal acts of a state employee are the acts of the state itself so as to impute criminality to the state. The decision of the Court of Appeals, in effect, finds the State of Georgia guilty of criminal conduct. It is unthinkable that any federal court should formally make such an adjudication. The federal system is fundamentally based upon mutual respect for the dignity of the sovereigns.

It is well possible that an employee of any state or of the federal government may be guilty of criminally mistreating prisoners. In such cases, state court remedies are available.

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As this Court said, in

Wade v. Mayo, 332 U. S. 672,

"State courts are duty bound to give full effect to federal constitutional rights and it cannot be assumed that they will be derelict in their duty."

Also see,

Marbles v. Creecy, 215 U. S. 63
Drew v. Thaw, 235 U. S. 432

The opinion of the Court of Appeals, in effect, holds that the remedy available at the hands of the judicial system of Georgia is worthless. Thus the Court of Appeals not only holds that the penal system of Georgia permits the perpetration of crimes upon its prisoners; it holds, in effect, that the judiciary of Georgia provide no relief for such crimes.

If state court remedies are not available, or are not effective, the federal courts are open.

There is no suggestion in the instant case that the prisoner was or will be denied access to the Georgia courts or to the federal courts in Georgia for redress.

The State of Georgia respectfully submits that the decision of the Court of Appeals is derogatory to the State in its sovereign capacity, and should not be allowed to stand.

In addition to what is said herein, the State of Georgia adopts the argument and citations contained in brief filed by the petitioner, with the exceptions herein noted, and adds its request that the writ of certiorari be granted.

Respectfully submitted,

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Atlanta, Georgia,
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APPENDIX

Title 28, *United States Code, Section* 2252:

"Prior to the hearing of a habeas corpus proceeding in behalf of a person in custody of State officers or by virtue of State laws notice shall be served on the attorney general or other appropriate officer of such State as the justice or judge at the time of issuing the writ shall direct."

Title 28, *United States Code, Section* 2254:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

Constitution of the State of Georgia of 1877 *and Constitution of the State of Georgia of* 1945, *Art.* 1, *Sec.* 1, *Pars.* 9 *and* 11.

" *Paragraph IX. Bail; fines; punishment; arrest, abuse of prisoners.* Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted; nor shall any person be abused in being arrested, while under arrest, or in prison."

"*Paragraph XI. Habeas corpus.* The writ of Habeas Corpus shall not be suspended."

Georgia Code Ann., Title 50, *Sec.* 50-101.

"Any person restrained of his liberty under any pretext

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whatever, or any person alleging that another, in whom for any cause he is interested, is restrained of his liberty or kept illegally from the custody of the applicant, may sue out a writ of habeas corpus to inquire into the legality of such restraint."

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

NO. 332 OCTOBER TERM, 1949.

LEON JOHNSON, alias ROBERT McMILLAN,
Petitioner,

v.

CHARLES L. DYE, Warden of the Allegheny County Jail, Respondent.

PETITION FOR RE-HEARING AND STAY OF MANDATE AND BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

NO. 332 OCTOBER TERM, 1949.

LEON JOHNSON, alias ROBERT McMILLAN,
Petitioner,

v.

CHARLES L. DYE, Warden of the Allegheny County Jail, Respondent.

PETITION FOR RE-HEARING AND STAY OF MANDATE.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

AND NOW, comes the plaintiff petitioner, LEON JOHNSON, alias ROBERT MCMILLAN, by counsel, and prays this Honorable Court to grant a re-hearing in the above captioned case and to stay the mandate, pending disposition thereof.

FIRST: At the above number and term, respondent above named filed a petition for writ of certiorari, addressed to this Honorable Court and directed to the Court of Appeals for the Third Circuit, and the State of Georgia filed a brief in support thereof as *amicus curiae.*

SECOND: After due deliberation and discussion with the national office of the American Civil Liberties Union, it was decided not to oppose the petition for certiorari because of the importance of the case raising constitutional questions and for the further reason that it was felt and decided that an opinion from the United States Supreme Court was necessary and desirable to clarify these questions, and in support thereof, hereto attached, made a part hereof and marked Exhibit "A", is an Affidavit executed by Herbert M. Levy, Staff Counsel for the American Civil Liberties Union.

THIRD: Under date of October 22, 1949, counsel was in receipt of a communication from the Clerk of the United States Supreme Court, a copy of which is hereto attached, made a part hereof and marked Exhibit "B".

FOURTH: In reply thereto, counsel notified the Clerk of the United States Supreme Court by letter dated October 25, 1949, a copy of which is hereto attached, made a part hereof and marked Exhibit "C", that no answer would be filed in opposition to the petition for certiorari.

FIFTH: In reply thereto, counsel was in receipt of a communication dated October 28, 1949, a copy of which is hereto attached, made a part hereof and marked Exhibit "D", indicating that: "In the event certiorari is granted, the case will be heard in January."

SIXTH: Counsel was of the opinion that the certiorari would most likely be granted and after filing a brief in support of petitioner's position, that the case would be heard on oral argument by the United States Supreme Court.

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SEVENTH: On November 7, 1949, the United States Supreme Court entered the following Order in the above captioned proceedings:

> "PER CURIAM: The petition for writ of ceritorari is granted and the judgment is reversed. Ex parte Hawk, 321 U. S. 114. Mr. Justice Douglas took no part in the consideration or decision of this case."

EIGHTH: Counsel for your petitioner feels that the case deserves the attention and consideration of the United States Supreme Court on the merits and prays that a re-hearing may be granted in order that the case may be argued orally in accordance with the rules and that the mandate of this Honorable Court shall be stayed, pending action hereon.

NINTH: Counsel is herewith submitting a brief in support of the questions raised by this appeal.

Respectfully submitted,

SAMUEL J. GOLDSTEIN,
HYMEN SCHLESINGER,
Attorneys for Petitioner.

AFFIDAVIT.

State of Pennsylvania }
County of Allegheny } ss.:

Before me, a Notary Public, in and for the county and state aforesaid, personally appeared SAMUEL J. GOLDSTEIN, Esquire, who, being duly sworn according to law, deposes and says that the foregoing Petition is presented in good faith, not for the purpose of delay and the facts contained therein are true and correct to the best knowledge and information of your affiant.

/s/ SAMUEL J. GOLDSTEIN.

Sworn to and subscribed before me this 15th day of November, 1949.

/s/ LOIS E. THOMAS,
(SEAL) Notary Public.

My Commission Expires at the End of the Next Session of Senate.

Exhibit "A."

State of New York }
County of New York } ss.:

HERBERT M. LEVY, being duly sworn, deposes and says that:

1. He is Staff Counsel of the American Civil Liberties Union, hereinafter called "ACLU".

2. The case of Dye, petitioner, v. Johnson, is a test case brought by the said ACLU.

3. When deponent was advised that a petition for certiorari had been filed in the above-mentioned case, he immediately consulted by mail with Samuel J. Goldstein,

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Esq., Attorney of record for Johnson, and advised him of his opinion that a Supreme Court review of the case was desirable, although the decision below was favorable to ACLU, so as to settle the law on whether a state was barred from the use of the remedy of extradition if it had treated a prisoner with cruel and unusual punishment or would do so in the future. Deponent then advised the said Mr. Goldstein that it was his opinion that ACLU should take no action until and unless the Supreme Court granted certiorari, at which time ACLU would file a brief on behalf of Johnson in accord with the position of the Circuit Court of Appeals.

4. Deponent reported his views to a regular meeting of the Board of Directors of the American Civil Liberties Union held October 10, 1949 in New York, New York. The Board unanimously agreed to follow the said advice. The minutes read that "The Board approved an amount, not to exceed $250.00 to cover expenses if the Supreme Court grants review."

5. This information was conveyed by letter to the said Mr. Goldstein, dated October 13, 1949. On the 17th of October, 1949, the said Mr. Goldstein wrote deponent that "I am happy to inform you that the suggestions you made therein are all satisfactory. I have decided not to oppose certiorari and in the event the Supreme Court grants the writ, I shall represent Johnson * * *"

6. The above sets forth the only reasons for Johnson's failure to oppose the petition for certiorari. Deponent feels that this Court's action in reversing the decision below without hearing may have been due to the failure to oppose the petition. It was expected by

deponent as well as by other counsel for the ACLU that, in accordance with usual procedures, argument would be held and briefs submitted when certiorari was granted. Deponent respectfully submits that Johnson, a review of his case having been granted, is at the very least entitled to a hearing on the merits thereof, and deponent regrets exceedingly any misimpressions the Court may have been given which caused it to rule otherwise.

WHEREFORE, deponent respectfully requests that this petition for rehearing be in all respects granted.

(signed) HERBERT M. LEVY

Sworn to before me this 10th day of November, 1949.

(signed) FRED N. GRAFER
Notary Public,
State of New York, Qualified in Queens County, No. 41-1528150 Cert. Filed in New York County Commission Expires March 30, 1951.

(SEAL)

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Exhibit "B."

COPY

OFFICE OF THE CLERK,
SUPREME COURT OF THE UNITED STATES,
WASHINGTON 13, D. C.

October 22, 1949.

Samuel J. Goldstein, Esquire,
Pittsburgh, Pennsylvania.

Dear Sir:

The records of this office indicate that you accepted service of a copy of the petition and record in the case of Dye, etc. v. Johnson, etc., No. 332, October Term 1949, on September 20th. Accordingly, a brief in opposition should have been filed on or before October 20th. I assume that it is not your intention to file such a brief but because of the suggestion you made concerning the record, I wish to be certain that no opposition will be filed and that the petition may now be submitted to the Court for its consideration.

Yours truly,

CHARLES ELMORE CROPLEY, Clerk,

By /s/ H. B. Winny
Deputy

HBW:ds

Exhibit "C."

COPY

October 25, 1949.

Charles Elmore Cropley, Clerk,
Supreme Court of the United States,
Washington 13, D. C.

In Re: Dye v. Johnson,
332 October Term, 1949.

Dear Sir:

I am in receipt of yours of the 22nd anent the above case and would appreciate your informing me when this case might be called for argument in the event certiorari is granted. In the meantime, however, counsel intends to file a petition in re diminution of the record.

In reply to your query, please be informed that no answer will be filed in opposition to the petition for certiorari.

Yours very truly,

.....

SJG:PR

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Exhibit "D."

COPY

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON 13, D. C.

October 28, 1949.

Samuel J. Goldstein, Esquire,
Pittsburgh, Pennsylvania.

Dear Sir:

I have your letter of the 25th instant advising me that you will not file a response to the petition for writ of certiorari in the case of Dye, etc. v. Johnson, etc., No. 332, October Term, 1949. Accordingly, the petition will be submitted to the Court for its consideration and action may be expected on November 7th. In the event certiorari is granted, the case will be heard in January.

Yours truly,

CHARLES ELMORE CROPLEY, Clerk,

By /s/ H. B. Winny
Deputy

HBW:ds

IN THE

Supreme Court of the United States

NO. 332 OCTOBER TERM, 1949.

LEON JOHNSON, alias ROBERT McMILLAN,
Petitioner,

v.

CHARLES L. DYE, Warden of the Allegheny County Jail, Respondent.

BRIEF IN SUPPORT OF PETITION FOR RE-HEARING.

History of the Case.

The petitioner, Leon Johnson, is in the custody of the Commonwealth of Pennsylvania and is presently confined in the Allegheny County Jail, of which the respondent, Charles L. Dye, is the Warden. Johnson was indicted in the Cobb County Superior Court of the State of Georgia for the murder of one Sarah Frances Thompson on December 6, 1942. He was tried by a jury which found him guilty of murder with a recommendation of mercy on January 25, 1943. Under the law of Georgia, Georgia Code (fol. 59) Annotated, 1935, Title 26, § 1005, the recommendation of the jury fixed the penalty at life imprisonment. The court thereupon sentenced Johnson

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to hard labor for life.[1] In June 1943, the petitioner escaped from a Georgia chain gang and eventually came to Allegheny County, Pennsylvania. Governor Arnall of Georgia dispatched a requisition for extradition to Governor James of Pennsylvania who issued an executive warrant under which Johnson was apprehended. An application for extradition was made pursuant to the Uniform Criminal Extradition Act, Laws of Pennsylvania 1941, July 8, P. L. 288, 19 P. S. Pa. § 191. See also the so-called "Interstate Extradition Act," R. S. § § 5278-0, 18 U. S. C. § § 662-3, 1940 ed. So far as appears Governor James did not call on the Attorney General or any prosecuting officer of Pennsylvania as he was authorized to do under the Act to investigate the demand made by the State of Georgia. Johnson petitioned the Court of Common Pleas of Allegheny County for a writ of *habeas corpus* at its No. 3679, April Term, 1946. The Court of Common Pleas refused to free Johnson and discharged the writ. The decision was reviewed by the Superior Court of Pennsylvania which affirmed the judgment of the court below. 159 Pa. Super. 542, 49 A. 2d 195. No review was sought by Johnson in the Supreme Court of Pennsylvania or in the Supreme Court of the United States. On November 14, 1946 Johnson petitioned the United States District Court for the West-

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[1] The Court apparently exceeded its authority in sentencing Johnson to *hard labor*. The law of Georgia authorizes "confinement and labor," where the sentence includes imprisonment. See Georgia Code Annotated, Title 27, Sec. 2504. However, this unlawful imposition of hard labor to the sentence of imprisonment does not of itself render the sentence void so as to entitle the prisoner to discharge on *habeas corpus*. See Harlan v. McGourin, 218 U. S. 442; U. S. v. Pridgeon, 153 U. S. 48.

ern District of Pennsylvania for a writ of *habeas corpus*. After the issuance of a rule to show cause on the petition and upon answers filed and after a full hearing the court below filed an opinion, 71 F. Supp. 262, and discharged the writ. Johnson appealed to the Court of Appeals who, on May 17, 1949, reversed the court below on the theory that Johnson's constitutional right had been violated by the cruel and inhuman punishment to which he was subjected at the hands of his jailors to the extent that his life and health was in grave jeopardy if returned to the State of Georgia.

The Court of Appeals held that the State of Georgia had failed signally in its duty as one of the sovereign states to treat a convict with decency and humanity in violation of the Fourteenth Amendment and in violation of the explicit mandate of the constitution of the State of Georgia. The testimony established that Johnson had been a member of a chain gang and treated with persistent and deliberate brutality.

Following the decision of the Court of Appeals, the defendant filed a petition for certiorari in this Honorable Court, which was granted on November 7, 1949, and the judgment of the court below was reversed without argument, no answer to the petition for certiorari having been filed by your petitioner in opposition thereto since it was felt that a decision by this Honorable Court was warranted and desirable.

Statement of Questions Involved.

1. Does the Due Process Clause of the Fourteenth Amendment include by implication the cruel punishment prohibition contained in the Eighth Amendment?

2. In extradition cases, is the theory of exhaustion of remedies applicable?

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Argument.

I.

The Lower Court in holding that the Eighth Amendment was not a limitation upon the states cited *Collins v. Johnston,* 237 U. S. 503 but the Court of Appeals held that the Lower Court misinterpreted the ruling of Collins v. Johnston. In that case there was an appeal to the Supreme Court from a denial of the Lower Federal Court for a writ of *habeas corpus.* Among other things, the petitioner alleged that the sentence of fourteen years (for perjury) was excessive but it appeared that the laws of California permitted the imposition of such a sentence even though the term may have been unusually long. The petitioner claimed that the imposition of such a sentence was the infliction of cruel and unusual punishment, hence in violation of his rights under the Fourteenth Amendment, since by implication the Fourteenth Amendment included the prohibitions contained in the first eight amendments. It was not found that there was any cruel and unusual punishment so that any rulings on this point can be turned *obiter.* But in any event, the Court relied on a whole line of cases holding that the Eighth Amendment was a limitation on the states and not on the Federal Government. There was no effort in the Collins case by the petitioner to argue that deprivation of due process in the Fourteenth Amendment included all of the prohibitions contained in the Bill of Rights. Even today however, under the new and accepted theory all of the prohibitions contained in the Bill of Rights are not necessarily includable in the prohibitions contained in the Fourteenth Amend-

ment with respect to violation or deprivation of constitutional rights.

The Appeals Court stated that:

"While it is true that the Eighth Amendment to the constitution of the United States limits and was intended to limit Federal action, there is the modern view, and, we feel, the correct one, that where the right protected and guaranteed under the Bill of Rights (Amendments I to VIII) of the United States Constitution is 'basic' and 'fundamental' to the rights of life and liberty, recognized and guaranteed by the Constitution of the United States, then the due process clause of the Fourteenth Amendment prohibits a state from abridging or denying the right in question * * *"

In taking this view, the Appeals Court refused to make secure against state invasion all the rights protected from Federal violation by the Bill of Rights, *Chambers v. Florida,* 309 U. S. 227; *Twining v. New Jersey,* 211 U. S. 78; *Maxwell v. Dow,* 176 U. S. 581; *Palko v. Connecticut,* 302 U. S. 319 and *Hague v. C. I. O.,* 307 U. S. 496 (there were dissenting opinions in the Twining and Maxwell cases). But by gradual process of infiltration such rights as freedom of speech, freedom of religion, freedom of the press and the right to counsel have been included on the theory that where the right invaded is basic and fundamental, the due process clause of the Fourteenth Amendment includes by implementation those guarantees of the Bill of Rights. The Court of Appeals merely went one step further in adding that cruel and unusual punishment is so basic and funda-

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mental as to be included by implication in the rights guaranteed to every person by the Fourteenth Amendment: *Saia v. New York,* 334 U. S. 558; *Cantwell v. Connecticut,* 310 U. S. 296; *Marsh v. Alabama,* 396 U. S. 501; *Lovell v. Griffin,* 303 U. S. 444; *Hague v. C. I. O.,* 307 U. S. 496; *Wade v. Mayo,* 334 U. S. 672; *Powell v. Alabama,* 287 U. S. 45; *Betts v. Brady,* 316 U. S. 455; *Palko v. Connecticut,* 302 U. S. 319; *Francis v. Resweber,* 329 U. S. 459. (In this latter case, Mr. Justice Reed indicated that violation of the Fifth and Eighth Amendments as to double jeopardy and cruel and unusual punishment would be violative of the due process clause of the Fourteenth Amendment.

In *Best v. Brady,* 316 U. S. 455, the Court said:

"The Sixth Amendment of the national Constitution applies only to trials in federal courts. The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment, although a denial by a State of rights or privileges specifically embodied in that and others of the first eight amendments may, in certain circumstances, or in connection with other elements, operate in a given case to deprive a litigant of due process of law in violation of the Fourteenth."

In *Palko v. Connecticut,* 302 U. S. 324, the Court said:

"In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states."

In *Francis v. Resweber,* 329 U. S. 459, in an opinion by Justice Reed, concurred in by the Chief Justice, Mr. Justice Black and Mr. Justice Jackson, and in which Mr. Justice Frankfurter concurred but Justice Burton dissented, the petitioner was convicted of murder and sentenced to be electrocuted. Upon a proper death warrant, Francis was prepared for execution and placed in the electric chair but when the executioner threw the switch, death did not result. He was thereupon removed from the chair and returned to prison following which a new execution date was set and a new death warrant issued. The Supreme Court of Louisiana denied the petitioner's applications for certiorari, mandamus, prohibition and *habeas corpus* on the theory that the petitioner claimed the protection of the Due Process Clause of the Fourteenth Amendment for the reason that execution did deny him due process because of the double jeopardy provision of the Fifth Amendment and the cruel and unusual punishment provision of the Eighth Amendment.

The Supreme Court granted certiorari in order to consider the alleged violation of rights under the Federal Constitution. The case turned on the question as to whether or not the proposed enforcement of the criminal law of the state, viz., the second execution, was offensive to any constitutional requirements.

Justice Reed stated that there is:

"no difference from a constitutional point of view between a new trial on an error of law at the instance of the state that results in a death sentence instead of imprisonment for life, and an execution that follows a failure of equipment.

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When an accident, with no suggestion of malevolence, prevents the consummation of a sentence, the State's subsequent course in the administration of its criminal law is not affected on that account by any requirements of due process under the Fourteenth Amendment. We find no double jeopardy here which can be said to amount to a denial of Federal due process in the proposed execution.

Second. We find nothing in what took place here which amounts to cruel and unusual punishment in the constitutional sense. The case before us does not call for an examination into any punishments except that of death."

The Court cited *In re Kemmler,* 136 U. S. 436, which held that if the punishment prescribed for an offense was manifestly cruel and unusual as burning at the stake, crucification, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties within the constitutional prohibition. The Supreme Court added that:

"Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the constitution. It implies something inhuman and barbarous, something more than a mere extinguishment of life."

The Court further held that there was no denial to Francis of equal protection of the laws since he was not subjected to more cruel punishment than others in his position.

In his concurring opinion, Mr. Justice Frankfurter opined that the Fourteenth Amendment did not absorb the provisions of the Bill of Rights and added that:

> "Not until recently was it suggested that the Due Process Clause of the Fourteenth Amendment was merely a compendious reference to the Bill of Rights whereby the States were now restricted in devising and enforcing their penal code precisely as is the Federal Government by the first eight amendments. * * * The Fourteenth Amendment did not mean to imprison the states into the limited experience of the Eighteenth Century. It did mean to withdraw from the states the right to act in ways that are offensive to a decent respect for the dignity of man, and heedless of his freedom.
>
> * * * * * * *
>
> In an impressive body of decisions this Court has decided that the Due Process Clause of the Fourteenth Amendment expressed a demand for civilized standards which are undefined by the specifically enumerated guarantees of the Bill of Rights. They neither contain the particularities of the first eight amendments nor are they confined to them. * * * Insofar as due process under the Fourteenth Amendment requires the states to observe any of the immunities 'that are valid as against the Federal Government by force of the specific pledges of particular amendments,' it does *show cause* that 'have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the States.' *Palko v. Connecticut, supra,,* at 324-5."

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On this point, the Court relied on *Twining v. New Jersey*, 211-78; *Snyder v. Moss*, 291 U. S. 97; *Palko v. Connecticut, supra*, and *Feldman v. U. S.*, 322 U. S.

The Due Process Clause of the Fourteenth Amendment did not withdraw the freedom of the State to enforce its own notions of fairness unless according to Mr. Justice Cardozo

> "In so doing shall offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

> "Again, the State may be found to deny a person due process by treating even one guilty of crime in a manner that violates standards of decency, more or less universally accepted though not when it treats him by a mode about which opinion is fairly divided. But the penological policy of a State is not to be tested by the scope of the English Amendment and therein involved in the controversy which is necessarily evoked by that Amendment as to the historic meaning of 'cruel and unusual punishment.' See *Weems v. U. S.*, 217, U. S. 349, and particularly the dissenting opinion of White and Holmes, J. J."

In a dissenting opinion by Mr. Justice Burton, concurred in by Douglas, Murphy and Rutledge, the opinion stated that:

> "A capital case before us presents an instance of a violation of constitutional due process that is more clear than would be presented by many lessor punishments prohibited by the Eighth Amendment. • • • Taking human life by unnecessary cruel means shocks the most fundamental instincts of

> civilized man. * * * It is unthinkable that any state legislature in modern times would enact a statute expressly authorizing capital punishment by repeat applications of an electric current separated by intervals of days or hours until finally death shall result."

The dissenting opinion held that there could be no implied provision in the penal code of Louisiana for the application of a second, third or more subsequent currents of electricity on subsequent occasions. When the test of whether or not electrocution was violative of the Fourteenth Amendment the decision upholding the punishment was based primarily on the conclusion that such punishment resulting in death was instantaneous, painless and humane.

Judge Biggs pointed out that actions of the employees of the prison system of Georgia must be deemed to be those of the State of Georgia, and the fact that a state officer acts illegally cannot relieve a State of responsibility for his acts. *Screws v. U. S.*, 325 U. S. 91.

In deciding the question of whether or not Johnson was subjected to cruel and unusual punishment, although it was clear that the Court Below did not expressly state that he found Johnson's evidence credible, the District Court nevertheless found that he had been subjected to cruel and unusual punishment. The Court of Appeals ruled that:

> "In any event upon appeal in a *habeas corpus* case all questions of law or fact arising upon the record, including the evidence, are open to consideration by the appellate court and the trial court has no au-

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thority to make conclusive findings of fact as in the ordinary action, Johnson v. Sayre, 158 U. S. 109, and we are not bound by the conclusions of the trial court, Carruthers v. Reed, 8 Cir., 102 F. 2d 933, 937. The hearing before this court is technically *de novo*. It is our conclusion upon careful consideration of the record in the court below that Johnson was subjected to cruel and unusual punishment following his sentence and that this holding is in accordance, and not at variance, with that of the court below. Indeed no other conclusion would be possible in view of the known facts concerning the working of the Georgia penal system at the time of the petitioner's sentence and in consideration of the circumstance that the State of Georgia offered no testimony whatsoever in contradiction to that given by Johnson and his witnesses. (fol. 67) Our conclusion that Johnson was subjected to cruel and unusual punishment is buttressed by the decision of the Supreme Court in *In re* Kemmler and Weems v. United States, *supra*. Weems, under Section 56 of the Penal Code of the Philippine Islands, Act of July 1, 1902, had been guilty and had been sentenced *inter alia* 'to the penalty of fifteen years of cadena together with the accessories of Section 56 of the (Philippine) Penal Code * * *'. The *cadena* consisted of a chain at the ankle hanging from the wrists to be worn at all times. The 'accessories' of Section 56 would have deprived Weems almost completely of personal and familial rights and subjected him to constant surveillance by the authorities. The Supreme Court of the United States, by Mr. Justice McKenna, decided that the punishment was a cruel

and unusual one. Accordingly, the judgment was reversed and the trial court was directed to dismiss the proceedings. Though the Supreme Court has not set down any precise standard as to what constitutes cruel and unusual punishment, Wilkerson v. Utah, 99 U. S. 130, 135-6, we conclude without hesitation that if Johnson was treated by the prison authorities of Georgia in the manner which he alleges, he was subjected to cruel and unusual punishment by the State of Georgia. We know of no way in which degrees of cruelty may be measured coldly as if upon an altimeter, so much for the heights of cruelty, so much for the depths thereof.

The obligation of a State to treat its convicts with decency and humanity is an absolute one and a federal court will not overlook a breach of that duty. The Supreme Court so held in effect in the Weems case though the punishment of the *cadena* had been imposed by a Territorial Court of the Philippines. The obligation not to inflict cruel and (fol. 68) unusual punishment laid upon a State by the Constitution of the United States must be deemed to be positive and binding. In the Weems case cruel and unusual punishment reasonably was to be anticipated under the sentence. In the instant case, cruel and unusual punishment already has been inflicted on Johnson as the court below and we ourselves have found. History is as potent a force as anticipation. It follows, therefore, that Johnson must be set at liberty for the State of Georgia has failed signally in its duty as one of the sovereign States of the United States to treat a convict with decency and humanity. It must be pointed out also that

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she has failed also to observe the explicit mandates of her own Constitution which pointedly, as if the very evil here under consideration was in mind, go as far, if not farther, than those of the Eighth Amendment to the Constitution of the United States."

II.

At the outset it is pertinent to state the general rule which has come to be known as the doctrine of exhaustion of state remedies as it applies to a petition for writ of *habeas corpus* to discharge a person held in violation of his federal constitutional rights. The rule (which is really a custom or practice followed by the Federal Courts) was stated by the Supreme Court *Ex Parte Hawk,* 321 U. S. 114:

> "*Ordinarily* an application for habeas corpus by one *detained under a state court judgment of conviction* for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari have been exhausted." (emphasis ours)

We emphasize the portion of the above rule which we consider of vital importance in this case and which is to be carefully distinguished from the rule in extradition cases. We note below an important modification of the rule in the Hawk case made by the Supreme Court in *Wade v. Mayo,* 334 U. S. 672.

The reasons for the rule, says the Court, are "grounded primarily upon the respect which federal

courts have for the state judicial processes and upon the administrative necessities of the federal judiciary."

In order to avoid collision with the state courts, the federal courts have always felt that state courts of the state of the "judgment of conviction for crime" should have the first opportunity to pass upon the federal constitutional questions raised by the prisoner. With this rule we do not take issue. It is not, however, applicable to *habeas corpus* proceedings in extradition cases. Where the prisoner is confined in a jurisdiction other than that of the state where the judgment of conviction was entered, we submit that applicable statutes and decisions permit the constitutional question to be raised in the asylum state either in the state or federal courts. This Court squarely ruled on this issue in the case of *U. S. ex rel Darcy v. Supt. of County Prisons,* 111 F (2) 409, 411:

> "The right of the State of California, to demand the rendition of the relator from the State of Pennsylvania is found in Article IV, Sec. 2, Clause 2 of the Constitution of the United States. This clause is not self-executing but is made effective by Act of Congress. The Supreme Court has construed this act as placing the burden upon the governor of the asylum state to determine, before complying with the demand, whether the person demanded is substantially charged with a crime, and whether he is a fugitive from justice. This determination may be made by the governor without a hearing, *but if the alleged fugitive considers himself aggrieved by the order he may obtain a hearing upon writ of habeas corpus. The writ may be allowed either by a state or a federal court."* (emphasis ours)

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Judge Maris, in writing the Opinion, based his reasoning on the case of *Robert v. Reilly,* 116 U. S. 80, which has been cited frequently with approval. The Supreme Court denied certiorari in the Darcy case at 311 U. S. 662.

In another recent case which considered the issue of jurisdiction of the federal courts in extradition cases it was decided that not only does the petitioner have the right to make an election between federal and state courts but after having made such an election and having proceeded in the state courts, he could discontinue the state court proceedings and institute *habeas corpus* application in the federal courts, *United States v. Meyering,* 75 F (2) 716, 718.

The rule relating to extradition cases differing as it does from all other *habeas corpus* actions, is similarly stated in *22 Am. Jur.,* p. 293, Extradition sec. 54:

> "After the governor causes, by his warrant, the arrest and delivery of a person charged as a fugitive from justice from another state, the prisoner, since he is held under color of authority derived from the Constitution and laws of the United States, may invoke the judgment of the Federal, as well as the state tribunals on the lawfulness of his arrest and imprisonment."

It makes no difference whether a given state has enacted a state extradition law or not because the effect of such extradition statutes are simply in aid of and ancillary to the Act of Congress, as is stated in 135 A. L. R., p. 985, annotation:

> "Extradition statutes have been enacted by some of the states, and the validity of such legislation an-

cillary to, and in the aid of, the act of Congress in regard to interstate extradition is now well established."

See also *22 Am. Jur.*, 249, Extradition, sec. 9.

While the 3rd Circuit Court in a Per Curiam Opinion in the case of *Powell v. Meyer,* 147 F (2) 606, sustained the District Court in refusing to entertain a petition for *habeas corpus* in an extradition case, we think that, in doing so, this Court did not take into consideration its Opinion in the Darcy case. This Court based its action on the case of *Sanderlin v. Smyth,* 138 F (2) 729, stating that, under the authority of the Sanderlin case, the petitioner must first exhaust his remedies in the State Courts. An examination of the Sanderlin case clearly shows that it is not an extradition case and, therefore, cannot rule the question of federal court jurisdiction in extradition cases. We think that the great weight of authority, as shown in the careful reasoning of Judge Maris, is in favor of the rule as stated by him in the Darcy case, (*supra*).

Notwithstanding our firm conviction that the rule in extradition cases is now well established and requires careful distinction from the rule in other *habeas corpus* actions requiring state remedies to be exhausted, we, nevertheless, contend that the petitioner in the case at bar has actually "exhausted" the state remedies and complied with the rule *as modified* in *Wade v. Mayo.* In the Wade case the Court re-stated the rule relating to exhaustion of remedies by declaring that it was no longer necessary to proceed by appeal or certiorari to that Court from the decision of the highest state court:

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"Writs of certiorari are matters of grace. Matters relevant to the exercise of our certiorari discretion frequently result in denials of the writ without any consideration of the merits. The constitutional issue may thus have no bearing upon the denial of the writ. Where it is apparent or *even possible* that such would be the disposition of a petition for certiorari from the state court's judgment, failure to file a petition should not prejudice the right to file a habeas corpus application in a district court. *Good judicial administration is not furthered by insistence on futile procedure.*" (emphasis ours)

We emphasize the statement of the Court that where resort to a higher court is not a matter of right but a matter of grace and there is a possibility that such court will not hear the case, then such procedure would be futile. By anology the same reasoning could be applied to the Pennsylvania courts. The Superior Court has passed on Johnson's application by appeal from the Common Pleas Court (159 Pa. Sup. 542). There is no right to appeal from the Superior Court to the State Supreme Court in cases of this kind as the matter is one of *discretion* whether the Supreme Court will allow such appeal. The applicable State statute, although it contains positive language, has been construed otherwise.

The Act of June 24, 1895, P. L. 212, sec. 7 (e) 17 P.S. 190 reads:

"Nevertheless in any action or proceeding whatever above committed to the final and exclusive decision of the said court (i.e. the Superior Court) there

may still be an appeal from its judgment to the Supreme Court:

* * * * * * *

Second. If the case involves the construction or application of the constitution of the United States or any statute or treaty of the U. S."

The language of the Act was stated to mean that appeals to the State Supreme Court were matters of grace only, even where a federal constitutional question was involved. The State Court based its reasoning on the analogy of the position of the U. S. Supreme Court as will be noted in the case of *Com. v. Gardner,* 297 Pa. 498:

"The Supreme Court of the United States has many times declined jurisdiction 'where it appears that the constitutional question (upon which jurisdiction must depend) is not * * * substantial' (citing cases); *the same rule obtains with us to the extent above indicated.*

"* * * a constitutional point once definitely decided by us no longer exists as such; therefore it may not be insisted upon in a subsequent case as entitling one to an appeal, and we see no reason here to allow an *appeal as a matter of grace.* (emphasis supplied.)

The primary reason for the adoption of the rule relating to exhaustion of remedies in the state courts in *habeas corpus* cases before application to the federal courts is to avoid collision between the two, *Wade v. Mayo.* A reasonable application of the rule relating to exhaustion of remedies (if this Court feels constrained

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to apply such rule in this case, which it is not required to do) would be that jurisdiction of the federal courts may be invoked when it is shown that the appropriate appellate court of the state where the prisoner is detained has passed on the constitutional questions raised. We have seen that application for certiorari to the U. S. Supreme Court is no longer necessary. By the same logic, it is our contention that application from the State Superior Court to the State Supreme Court by Petition For Allocatur is unnecessary, as this is a matter of grace and not a matter of right, even where federal constitutional questions are involved, *Com. v. Gardner.*

While it is true that the Pennsylvania Supreme Court has original jurisdiction in *habeas corpus,* as we shall see below, nevertheless, that court has been reluctant to review by such procedure the action of the Superior Court, especially where the issues raised in the Superior Court were the same as those being raised in the State Supreme Court. To illustrate, we cite the case of *Com. ex rel. Penland v. Ashe,* 341 Pa. 337, where the State Supreme Court held at p. 340:

> " In view of the fact that the relator petitioned the Superior Court for a habeas corpus and the issues he raised in that petition were decided by that court, he is not entitled at this time to file a petition for a habeas corpus on the same issues in this court."

In the Hawk case, *supra,* the petitioner had been denied a writ of *habeas corpus* by the Illinois Supreme Court but could still apply to the lower court and still have available a common-law writ of *coram nobis.* The Supreme Court said:

"Until that remedy has been sought without avail we cannot say that petitioner's state remedies have been exhausted."

In *U. S. v. Meyering,* 75 Fed. 2nd 716, it was held that:

"If a petitioner had begun a proceeding in a state court for habeas corpus, he could nevertheless discontinue that proceeding and file his petition for relief in a federal district court."

The decisions implied that the petitioner in the Meyering case could have complied with the requirements of exhausting his state court remedies by petitioning the U. S. Supreme Court for certiorari to the Supreme Court of Illinois, then abandoning the proceeding and filing a petition for writ of *habeas corpus* in the District Court. This is a pure technicality and is a distinction without difference since petitions for certiorari, as we have seen, are matters of grace, not of right.

It must be borne in mind that the petitioner in the instant case is not detained in Pennsylvania by virtue of a state court judgment, which is the holding in the Hawk case, but rather, is detained in Pennsylvania by virtue of a warrant of arrest issued by the Governor of Pennsylvania on extradition process. On this point, the court below held that:—

The doctrine of exhaustion of State remedies in *habeas corpus* cases does not apply to extradition. This court in *United States v. Superintendent of County Prisons* (1940), 111 F. 2d 409, 411, cert. den. 311 U. S. 662, stated: "The right of the State of California to

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demand the rendition of the relator from the State of Pennsylvania is found in Article IV, Section 2, clause 2 of the Constitution of the United States. This clause is not self-executing but is made effective by act of Congress (then Section 662 of Title 18, U. S. C., 1940 ed., now Section 3182 of Title 18, U. S. Code). The Supreme Court has construed this act as placing the burden upon the governor of the asylum state to determine, before complying with the demand, whether the person demanded is substantially charged (fol. 49) with a crime and whether he is a fugitive from justice. This determination may be made by the governor without a hearing, but if the alleged fugitive considers himself aggrieved by the order he may obtain hearing by a writ of *habeas corpus*. The writ may be allowed either by a state or federal court.", citing upon the last point referred to *Roberts v. Reilly*, 116 U. S. 80, *Drew v. Thaw*, 235 U. S. 432, *Biddinger v. Commissioner of Police*, 245 U. S. 128, and *Hogan v. O'Neill*, 255 U. S. 52. It was held by the Court of Appeals for the Seventh Circuit in *United States v. Meyering*, 75 F. 2d 716, 718, that if a petitioner had begun a proceeding in a State court for *habeas corpus* he could nonetheless discontinue that proceeding and file his petition for relief in a federal district court. See also *22 Am. Jur., Extradition*, Section 54, p. 293, where it is stated: "After the governor causes, by his warrant, the arrest and delivery of a person charged as a fugitive from justice from another state, the prisoner, since he is held under color of authority derived from the Constitution and laws of the United States, may invoke the judgment of the Federal, as well as the state, tribunals on the lawfulness of his arrest and imprisonment." See also *135 A. L. R.* at p. 985.

The Court below (Biggs, J.) concluded:

"In a per curiam opinion in the case of Powell v. Meyer (1945), 147 F. 2d 606, 607, this court overruled its decision in United States v. Superintendent of County Prisons sub silentio relying upon the decision of the Court of Appeals for the Fourth Circuit in Sanderlin v. Smyth, 138 F. 2d 729. The Sanderlin case, however, was not in point for in that case the application for habeas corpus was made to release the petitioner from a sentence imposed by a state court and the usual rule of exhaustion of state remedies necessarily applied. As we have said, the rule of exhaustion of state remedies does not apply where habeas corpus is sought to avoid extradition. We adhere to the rule which we announced in United States v. Superintendent of County Prisons and overrule our decision in (fol. 50) Powell v. Meyer. It follows that Johnson had the right to maintain the proceeding in the District Court in the instant case and we entertain no doubt but that he is entitled to his liberty."

Respectfully submitted.

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Attorneys for Petitioner.

No. 332. DYE, WARDEN, *v.* JOHNSON. On petition for writ of certiorari to the United States Court of Appeals for the Third Circuit. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed. *Ex parte Hawk*, 321 U. S. 114. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case. *T. McKeen Chidsey*, Attorney General of Pennsylvania, *H. J. Woodward*, *Raymond D. Evans*, Deputy Attorneys General, and *William S. Rahauser* for petitioner. *Eugene Cook*, Attorney General, and *M. H. Blackshear, Jr.*, Assistant Attorney General, filed a brief for the State of Georgia, as *amicus curiae*, supporting the petition. Reported below: 175 F. 2d 250.